

MEMORANDUM

Washington, D. C.

May 21, 1940

TO           The Director of Retirement Claims

FROM        The General Counsel

SUBJECT    (The) National Fitch Corporation

THE NATIONAL FITCH CORPORATION, hereinafter referred to as "Fitch Corporation", incorporated under the laws of the State of Delaware on February 29, 1940, has asked the Board to make a determination of its status under Section 1(a) of the Railroad Retirement Act and the Railroad Unemployment Insurance Act.

The Fitch Corporation was organized pursuant to an agreement between MOTOR TERMINALS, INC., NATIONAL CAR COMPANY (hereinafter referred to as "Car Company") and FRUIT GROWERS EXPRESS COMPANY (hereinafter referred to as "F.G.E.").

From the information submitted by Counsel for Fitch Corporation, it appears that the capital stock of Fitch Corporation is 6,170 shares, no par value, equally owned by the Car Company and Motor Terminals, Inc. The Car Company is a wholly-owned subsidiary of F.G.E. and hires to railroads and others, special cars which it obtains from F.G.E. It elects three of the directors of Fitch Corporation and the other three are elected by Motor Terminals, Inc. The officers of Fitch Corporation are elected annually and those elected to the first term of office were to be satisfactory to the Car Company. The officers of Fitch Corporation with the exception of the president are also officers of Car Company and F.G.E. The vice president of Fitch Corporation is president of Car Company and F.G.E., and the secretary, treasurer and assistant treasurer hold the same offices in all three companies. The Comptroller, who is not an officer, is expected to be the present Comptroller of the Car Company and F.G.E. Three directors constitute a quorum for the purpose of transacting the business of the corporation. It appears that insofar as Motor Terminals, Inc., is concerned, that company is merely interested in the profit of the enterprise of the Fitch Corporation. An agreement between the three companies (Fitch Corporation, Car Company and Motor Terminals, Inc.) provides that all accounting necessary in connection with the contracts made by Fitch Corporation and in connection with the payments made to Fitch Corporation by the Car Company for the services rendered shall be performed by the Car Company who shall keep proper books and records

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thereof, including books of Fitch Corporation with respect thereto, and the latter shall reimburse the Car Company for the cost of keeping its books and accounts. The agreement further provides that all contracts made by the Fitch Corporation in the name of the Car Company shall be subject to the approval of the Car Company and that the terms of contracts entered into by Fitch Corporation in its own name shall be agreed upon between Fitch Corporation and the Car Company. This fact together with the fact that the officers, with the exception of the president, of the Fitch Corporation are also officers of the Car Company, that one-half of its directors are elected by the Car Company, and that all accounting and bookkeeping with respect to Fitch Corporation transactions are performed by the Car Company, clearly indicates that the Fitch Corporation is controlled by the Car Company. Since Car Company is controlled by F.G.E., which in turn is owned and controlled by some twenty railroads, it follows that Fitch Corporation is indirectly controlled by one or more carriers by railroad subject to Part I of the Interstate Commerce Act. This is also the view of Counsel for Fitch Corporation.

Accordingly, whether or not Fitch Corporation is an "employer" within the meaning of Section 1(a) of the Act, depends on whether or not it performs any service, other than casual or trucking service, in connection with the transportation of property by railroad. That it does perform substantial services, other than trucking, in connection with the transportation of property by railroad is shown by the facts set forth below.

Motor Terminals, Inc., a privately owned company, is engaged by contract in inter-terminal freight transfer by truck for various railroads at Cincinnati, and was the owner of some 250 patents pertaining to the art of coordinating rail and truck service through special cars, tanks, other containers and car and truck trailer fixtures and cranes and other interchange devices designed to transfer such tanks and containers from railroad freight cars to motor trucks and vice versa. Upon the formation of the Fitch Corporation these patents were transferred to it and Car Company was given an exclusive license for the full terms of the patents and any reissues, renewals, or extensions thereof. The Fitch Corporation was made the exclusive and perpetual sales organization for negotiating contracts with shippers, receivers, railroads, and others for their use of the equipment covered by the patents, which equipment is to be furnished by the Car Company. The contracts for the use of such equipment except truck fixtures and appliances and cranes and other interchange devices, are to be in the name of the Car Company and subject to its prior approval. The truck fixtures and appliances and cranes and other interchange devices are to be bought or leased by the Fitch Corporation from the Car Company at cost and sold, leased, or sublet in Fitch Corporation's name to shippers, receivers, railroads, or others for use in connection with the railroad cars, tanks, and other appliances supplied, upon

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reasonable terms to be agreed upon between Fitch Corporation and Car Company. The contracts entered into in the name of the Car Company are to secure to it the right to collect from railroads all car mileage allowances and other charges payable by them for the use of the facilities or services furnished under the contracts at the contemporaneous mileage rates established by the Association of American Railroads or by tariffs lawfully in effect as they may respectively apply and are to provide also that user contractors will pay Car Company for the use of such equipment and services in connection therewith agreed amounts per day to be determined by Fitch Corporation and Car Company and to be payable to Car Company monthly.

It appears further that at the present time Fitch Corporation leases cars, containers and other equipment primarily to shippers although it holds itself out to lease such equipment directly to railroads and others who desire to use them. The Car Company receives a certain sum per day for such use, in the nature of a guaranty, to the extent of which mileage it receives from the railroads is credited to the user. The Fitch Corporation does not undertake the transportation of goods. When shippers use the equipment, arrangements for the transportation of the cars, tanks and containers over the carriers' rail lines are made by the shippers with the railroads, and arrangements for transportation of the tanks and containers by motor truck are made by the shippers with the trucking companies.

The advantages gained by the shipper in using container cars and equipment are that the goods shipped receive much less handling in transportation from consignor to consignee, saving the shipper much expense in loading, unloading and trucking as well as the expense of crating or boxing and the charge for extra weight of such crates and boxes. Loading and unloading is reduced from six steps, (1) loading truck at shipper's platform (2) unloading truck at railroad station (3) loading freight into cars at origin (4) unloading freight cars at destination (5) loading freight into consignee's truck at destination (6) unloading truck at consignee's door, to only two handlings, (1) loading containers at consignor's door and (2) unloading freight from containers at consignee's door. The carriers themselves save the expense of loading and unloading less-than-carload freight at the station and through the container cars, tanks and equipment provide a service which because of less frequent handling reduces the loss and damage claims on less-than-carload traffic. Container car service is further economically related to the obligations undertaken by carriers by railroad in that it enables the railroads to hold to their lines traffic which might otherwise travel entirely by motor truck over the highways. Fitch Corporation, being controlled by some twenty railroads, is in reality the agent of those railroads for accomplishing this purpose. As stated by Counsel for Fitch Corporation, "the purpose of the enterprise is the coordinating of the use of railroads and trucks to hold or recover for the railroads traffic that would

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otherwise go to trucks, \*\*\* Like a railroad traffic manager Fitch Corporation acts as a liaison between established railroads and shippers or other local truckers. It engineers the changes whereby their respective functions may be coordinated to mutual advantage and negotiates the contracts between the Car Company and the users of the latter's equipment for that purpose. No equipment is contracted except for coordinated use in connection with railroad traffic."

Furthermore, in view of the fact that the railroads pay mileage allowances to the Car Company for its cars, tanks, other containers, etc., it is apparent that such equipment is being furnished to the railroads by the Car Company, which is thereby relieving the railroads of their common carrier obligation to furnish equipment. Paragon Refining Company v. Alton & Southern Railroad, 118 I.C.C. 166, Such furnishing of cars, tanks and other containers by the Car Company is a service similar to that performed by railroad controlled refrigerator car companies in furnishing refrigerator cars to railroads, which service has been held to be a service in connection with the transportation of property by railroad. See the Chairman's letter of February 23, 1938 to E. A. Clancy, Assistant Comptroller, New York Central System in re Northern Refrigeration Line, Inc. Since Fitch Corporation is the instrumentality which enables the Car Company to furnish its cars and other equipment to the railroads, its service in this connection obviously is of the same character as that performed by the Car Company.

In view of the foregoing, it is my opinion that Fitch Corporation is performing substantial services, other than trucking, in connection with the transportation of property by railroad within the meaning of the Railroad Retirement Act and the Railroad Unemployment Insurance Act. Since it is indirectly controlled by one or more carriers by railroad subject to Part I of the Interstate Commerce Act, it is an "employer" within the meaning of those Acts and service rendered to it is creditable toward annuities and benefits thereunder.

H.W.D.  
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